

# ETHICS BOWL

Ethical Scenarios in a  
Question and Answer Format

The Honorable Pamela B. Johnson  
The Honorable Joshua D. Baker



Building a Better Tomorrow

# LET'S GET ETHICAL . . .

# Scenario 1: Attorney Fees

# Assumed Facts

- Attorney takes on employee as client
- Before assuming representation, employer offered \$20,000 to settle case with open meds
- Employee declines settlement
- Attorney files a PBD, secures a higher rating through IME, takes depositions, and preps for trial
- Employer ups the settlement offer to \$30,000 with open meds.
- Employee insists on accepting the offer

# Query

Is it ethical for the attorney to take a standard 20% fee on the entire \$30,000 despite the prior offer, or should the attorney only take a fee on the difference?

# Considerations

Rule 1.5 (a) – “A lawyer shall not make an arrangement for, charge or collect an unreasonable fee or an unreasonable amount for expenses.”

# Considerations

- Factors determining reasonableness of fee award (non-exclusive and not all are relevant):
  - Time and labor
  - Novelty and difficulty
  - Legal skill required
  - Customary fee in area for similar service
  - Case value and results obtained

# Considerations

- Factors continued:
  - Nature and length of professional relationship with client
  - Time limitations imposed by client
  - Lawyer's experience, reputation and ability
  - Fee arrangement: contingent or fixed
  - Prior advertising from attorney concerning fees
  - Written fee agreement?



# Scenario 2: (More) Attorney Fees

# Assumed Facts

- Attorney takes on employee as client
- Before assuming representation, employer offered \$20,000 to settle case and \$5,000 to close meds
- Employee declines settlement
- Attorney files a PBD, secures a higher rating through IME, takes depositions, and preps for trial
- Case settles for \$30,000 plus \$5,000 to close meds

# Query

Is it ethical for the attorney to take a fee on the amount paid to close medical benefits despite no increase from prior offer on med closure amount?

# Considerations

Rule 1.5 (b):

“The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation[.]”

# Scenario 3: Attorney Fees (Again)



# Assumed Facts

- Attorney takes on employee as client
- Case settles for \$30,000 plus \$10,000 to fund a Medicare Set Aside (MSA) arrangement approved by Medicare (CMS)

# Query

Is it ethical for the attorney to take a fee on the amount paid to fund the MSA?

# Considerations

May 7, 2004 CMS Memorandum:

“Administrative fees/expenses for administration of the [MSA] and/or attorney costs specifically associated with establishing the [MSA] cannot be charged to the [MSA]. The CMS will no longer be evaluating the reasonableness of any of these costs because the payment of these costs must come from some other payment source that is completely separate from the [MSA] funds.”



# Scenario 4: Lawyer Obligations

# Assumed Facts

- Attorney takes on employee as client
- Employee has outstanding medical bills for unauthorized care and the providers have asserted liens and/or the bills are in collection
- The parties settle on a doubtful and disputed basis
- During negotiations, attorney reports that it has reached an agreement with the medical providers to pay for the care with a portion of the settlement proceeds

# Queries

Can the employer require the attorney to execute a release that requiring the attorney to ensure that medical expenses are paid from the settlement proceeds?

Is the attorney required to indemnify and hold the employer harmless for any if the expenses are not paid from the settlement proceeds?

# Considerations

## Formal Ethics Opinion 2010-F-154:

- A lawyer who has notice that a creditor of the client has a lien or assignment to the funds on behalf of the client is ethically obligated to segregate and retain the disputed funds until the dispute is resolved.
- Requiring a plaintiff's attorney to enter into the agreement posed in the inquiry, particularly requiring that the attorney indemnify and/or hold harmless any party being released or subrogation interest holder from medical expenses or liens, creates a conflict between the interests of the plaintiff's attorney and those of their client.

# Scenario 5: Lawyer Obligations (Part Deux)



# Assumed Facts

- Employee asks attorney to represent her in a workers' compensation case
- Attorney declines to take on employee as a client but helps employee complete a Petition for Benefit Determination (PBD)

# Query

Must Attorney disclose her involvement in completing the PBD on the form?

# Considerations

Rules 1.2(d) and 8.4(c):

The Rules of Professional Conduct prohibit attorneys from “assist(ing) a client in conduct the lawyer knows or reasonably should know is criminal or fraudulent”

And

“Engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”



# Considerations

Formal Ethics Opinion 2007-F-153.

An attorney in Tennessee may not engage in extensive undisclosed participation in litigation on behalf of a self-represented litigant as doing so permits and enables the false appearance of being without substantial professional assistance.

Prohibition does not extend to providing undisclosed assistance to a truly self-represented litigant. Thus, an attorney may prepare a leading pleading including, but not limited to, a complaint, or demand for arbitration, request for reconsideration or other document required to toll a statute of limitations, administrative deadline or other proscriptive rule, so long as the attorney does not continue undisclosed assistance of the self-represented litigant.

# Scenario 6: Lawyer Obligations (III)



# Assumed Facts

- Employee seeks representation but no attorney will take his case.
- Employee files Petition for Benefit Determination on his own behalf. During alternative dispute resolution proceedings, Bureau Mediator directs Employee to Ombudsman Services.
- Parties are unable to resolve dispute during ADR and Bureau Mediator issues Dispute Certification Notice.

# Assumed Facts

- Employee contacts Ombudsman Attorney and asks for advice on how to file Request for Expedited Hearing to initiate medical benefits. Ombudsman Attorney explains procedures and what Employee can expect at the hearing.
- Employee asks Ombudsman Attorney what information he should include in his affidavit and what medical records he should attach. Ombudsman Attorney explains the standard of proof required to prevail and the elements of Employee's cause of action.

# Queries

Was an attorney/client relationship created?

Are the communications between the Employee and Ombudsman Attorney confidential?

Can the Ombudsman Attorney advise the Employee of the potential value of the claim?

# Considerations

Rule 1.2(c) – “A lawyer may limit scope of representation if limitation is reasonable and client gives consent, preferably in writing, after consultation.”

T.C.A. sec. 50-6-216(e)(2) “an ombudsman who is a licensed attorney may provide limited legal advice but shall not represent any party as the party’s attorney.”

# Considerations

Formal Ethics Opinion 2017-F-162 –

- Ombudsman Attorney may explain: basic legal principles, procedures, the standard of proof, the elements of the Employee's cause of action and of any affirmative defenses raised by Employer, the medical proof needed and avenues to obtain the information, the methodology for calculating a compensation rate and an award of permanent disability benefits.
- Ombudsman Attorney may NOT: appear on Employee's behalf, draft or file documents on behalf of Employee, review or analyze Employee's documents prior to submission, testify or disclose confidential information, make attorney referrals, or advise as to value of claim or issues to raise on appeal.

# Scenario 7: Conflicts of Interest (going once)





# Assumed Facts

- Attorney retained to represent Employee
- Employer disputed the claim
- Employee's private health insurance paid the medical bills

# Query

Is it ethical for the attorney to represent both the employee and the private health insurance carrier, who is seeking to recover subrogation lien?

# Considerations

Rule 1.7(b) and Formal Ethics Opinion 95-F-136.

A lawyer may represent the client and the client's health insurance provider if it is obvious that the lawyer can adequately represent the interests of each and if each consents in writing to the representation after full disclosure of the possible effect of such representation.

# Scenario 8: Conflicts of Interest (going twice)



# Assumed Facts

- Insurer hires counsel to represent employer in workers' comp case.
- Employer representative denies claim and insists counsel defend it
- Prior to Compensation Hearing, adjuster instructs counsel to settle the claim and provides settlement authority.
- Employer representative instructs counsel to proceed to Compensation Hearing.

# Queries

What are counsel's ethical obligations under this scenario?

Does it make a difference that the Petition for Benefit Determination lists both employer and the carrier, and defense counsel was retained to represent both entities?

# Considerations

Formal Ethics Opinion 2000-F-145.

- The insured, not the insurer, is the lawyer's client.
- A lawyer may not accept employment by an insurer on behalf of an insured with conditions limiting or directing the scope and extent of representation of the insured in any manner, including the decision whether or not to appeal a judgment against the insured, whether or not to demand a jury, or whether or not to participate in mediation on the insurer's behalf, unless the client-insured has expressly agreed with any or all of the conditions limiting the nature or scope of the representation, and such agreement is confirmed in writing by the client-insured.

# Considerations

## Formal Ethics Opinion 2000-F-145 (Continued)

- If the insurer will not vary its directive, counsel must then consult with the insured. Counsel should describe the decision and its risks and benefits from the standpoint of the insured. Where appropriate, counsel should point out that the insurer might take the position that any unjustified refusal to permit counsel to follow its directions would breach the insurance contract. On the other hand, if the insured permits counsel to follow the insurer's directive, the insured could also reserve the right to hold the insurer responsible for any resulting damage to the insured. The insured should be advised of the utility of obtaining independent counsel, at the insured's own expense, in considering whether to acquiesce in the insurer's directive.



# Considerations

## Formal Ethics Opinion 2000-F-145 (Continued)

- If the insured objects to the insurer's directive, counsel must advise the insurer that counsel cannot comply. The insurer then has a choice of accepting the insured's position, by withdrawing the objected-to-directive (perhaps reserving its own right to assert that the insured has breached the policy); seeking to persuade the insured to withdraw the objection; or discharging counsel.
- In no event may counsel permit the insurer's directive to cause counsel to take action—without the insured informed consent—if counsel believes that action has a reasonable possibility of advancing an interest that would differ from that of the insured.

# Considerations

Rule 1.2(a) states in part, “a lawyer shall abide by a client’s decision whether to settle a matter.”

Rule 1.4(a)(1) sets forth the lawyer’s duty to inform client of settlement offer.

Rule 1.8, Comment 11. Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent in representation and in learning how the presentation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer’s independent professional judgment and there is informed consent from the client.

# Scenario 9: Conflicts of Interest (sold)



# Assumed Facts

- Employee files Petition for Benefit Determination against Employer and its insurer, alleging a gradual injury requiring surgery.
- Defense counsel discovers that employer's insurer changed after employee reports condition, but before employee misses work or undergoes surgery.
- New insurer is not named in the Petition for Benefit Determination.

# Queries

Can Defense Counsel move to amend the Petition for Benefit Determination and Dispute Certification Notice to allege the subsequent insurer is responsible for the claim, even though Defense Counsel represents Employer simultaneously?

What actions, if any, should Defense Counsel take to advise Employer of the situation, and can Defense Counsel continue representing Employer?

# Considerations

Rule 1.2(c). A lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent, preferably in writing.

Rule 1.2, Comment 6. The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insured to represent the insured, the representation may be limited to matters related to the insurance coverage.

# Considerations

Rule 1.7(a). A lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client or a third person.

# **Scenario 10: Obligations in Proposed Settlements**



# Assumed Facts

- Defense Counsel retained by insurer to obtain Court approval of proposed settlement.
- Settlement reached between employee and insurance adjuster.
- Employee is unrepresented.
- Claim settled for substantially less than what Employee would likely receive if case was tried.

# Queries

Does Defense Counsel have ethical obligation to inform Employee of potential for additional benefits if case tried?

Does Defense Counsel have ethical obligation to inform Insurer's Adjuster that terms do not provide Employee with "substantially the benefits to which Employee is entitled?"

# Considerations

*Dennis v. Erin Truckways, Ltd.*, 188 S.W.3d 578 (Tenn. 2006). Tennessee Supreme Court affirmed trial court's setting aside the settlement agreement, relying on a determination that Employee had not received "substantially the benefits to which he was entitled" under the Workers' Compensation Law.

# Considerations

Rule 3.3(a)(1)-(2). A lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to disclose legal authority known to the lawyer to be directly adverse to the position of the client.

Rule 4.1(a). In the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person.

# Considerations

Rule 4.3. In dealing with an unrepresented person, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role, the lawyer shall make reasonable efforts to correct the misunderstanding. Lawyer shall not give legal advice to an unrepresented person, other than advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such person are, or have a reasonable possibility of being, in conflict with the interests of the client.

# **Scenario 11: Contact With Other Parties and Witnesses (almost there)**



# Assumed Facts

- Employee hires Attorney.
- Dispute arises as to Employee's ability to return to work at pre-injury place of employment.
- Employer is represented by Defense Counsel.
- As Compensation Hearing approaches, Attorney takes Employee to Employer's place of business during peak business hours and asks to speak with "person in charge."
- As person approaches, Employee's Attorney demands to know why Employee was not offered a return to work.

# Query

Has Employee's Attorney violated any ethical rules?



# Considerations

Rule 4.2. A lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by counsel without consent of the other lawyer or unless authorized by law or court order.

Rule 4.2, Comment 7. In the case of a represented organization, this rule prohibits communications by a lawyer with a member of the represented organization's governing board, or an officer, manager, or supervisor.

# **Scenario 12: Contact With Other Parties and Witnesses (or, the end)**



# Assumed Facts

- Attorney represents Employee, who is currently off work.
- Defense Counsel represents Employer and Insurer.
- Employee is receiving medical and temporary disability benefits.
- Authorized treating physician has not addressed Employee's return-to-work capability, restrictions, or maximum medical improvement.
- Defense Counsel contacts authorized treating physician to discuss Employee's return to work, restrictions, and anticipated date of maximum medical improvement.

# Query

Has defense counsel violated any ethical rules?

# Considerations

Date of injury and language of any signed medical release or authorization for release of medical information.

Current TCA § 50-6-204(a)(2)(A). Employers or case managers may communicate with Employee's authorized treating physician, orally or in writing, and each medical provider shall be required to release the records of any Employee treated for a work-related injury to both Employer and Employee within 30 days after admission or treatment. There shall be no implied covenant of confidentiality with respect to these records. Employer shall mean and include the Employer, Employer's Attorney, Employer's Insurer, or Third-Party Administrator.

You Made It!

*That's all Folks!*



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# Questions?

# Thank you



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